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July 17, 2013

By First Class Mail & Electronic Mail

Records, FOIA and Privacy Branch
Office of Environmental Information
Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

**Re: Freedom of Information Act Request –
Resubmission of Request Number EPA-HQ-2013-008140**

Dear FOI Officer:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") and FOIA regulations at 40 C.F.R. § 2, and on behalf of the American Farm Bureau Federation ("AFBF"), I write to request information, as described in detail further below, from EPA Headquarters relating to the regulatory status under the Clean Water Act ("CWA") of precipitation runoff or precipitation "discharge" associated with concentrated animal feeding operations ("CAFOs") and animal feeding operations ("AFOs"). This request concerns only records in the possession of EPA Headquarters, as we intend to make separate requests to EPA Regional offices of interest.

This request constitutes a resubmission of Request Number EPA-HQ-2013-008140, submitted on July 12, 2013, which itself constituted a withdrawal of our request submitted May 3, 2013 (EPA-HQ-2013-006155) and submission of a substantively identical records request along with a fee waiver request. In correspondence dated July 15, 2013, EPA perfunctorily denied our fee waiver request on the basis that we had "not expressed a specific intent to disseminate the information to the general public." Although we disagree with the Agency's denial determination, we hereby resubmit our request to make crystal clear that AFBF intends to disseminate and make available to the public any responsive documents that EPA provides to AFBF by posting them on its public website, at www.fb.org, within two months of receipt.

Background of This Records Request

In a May 30, 2013 telephone discussion seeking to clarify the substance of AFBF's initial May 3, 2013 records request, representatives from EPA Office of General Counsel and Office of Water indicated that the Agency has previously granted FOIA fee waivers to non-profit organizations seeking similar scope of information. When asked if AFBF, a not-for-profit organization, could similarly request a fee waiver, the Office of General Counsel representative ultimately answered that a fee waiver would need to be submitted at the same time as the FOIA request. Consequently, we hereby submit our FOIA request with the fee waiver request included. Our expectation is that, pursuant to FOIA, the Agency has 20 working days from this submission to respond to this request and can of course provide partial responses as soon as they become available. As stated by the Attorney General in the 2009 FOIA Memorandum, "timely disclosure of information is an essential component of transparency."

We appreciate the Agency's willingness "to work in the spirit of cooperation" as President Obama has directed and to work with us to discuss the substance of our records request. As previously discussed, we look forward to the Agency getting back to us to further describe the types of records that Office of Water staff believes are responsive to our request and would not be protected from disclosure under FOIA. We also look forward to receiving documents responsive to this request from the Office of Enforcement as they become available.

FOIA is intended to ensure public access to government information and establish a presumption that all agency records be publically accessible unless specifically exempted from disclosure. According to the Attorney General's 2009 FOIA Memorandum, "unnecessary bureaucratic hurdles have no place in the new era of open Government that the President has proclaimed." AFBF is committed to ensuring that its members, state and regional Farm Bureau organizations, farmers and ranchers throughout the country, and the general public are informed about how government regulations and policies, including those by EPA that are the subject of this request, impact farming practices and rural communities. We appreciate EPA's assistance in providing access to the Agency's public records pursuant to this FOIA request.

Records Requested

Our records request is as follows: AFBF hereby requests all records relating to the CWA regulatory status of precipitation runoff (whether diffuse or channeled, and whether deemed by EPA to be "stormwater" or "process wastewater" or "discharge") associated with fan exhaust deposits or material tracked, spilled or otherwise deposited onto the ground outside of the confinement housing or waste storage or containment structures at CAFOs or AFOs, including whether such runoff should be deemed a "discharge" requiring a National Pollutant Discharge Elimination System ("NPDES")

permit. Without limiting the breadth of this request, as stated, we call EPA's attention to the following specific categories of records that are included in this request:

- (1) Any and all internal communications within EPA, including communications within EPA Headquarters or between EPA Headquarters and EPA Regions, relating to the CWA regulatory status of the above-described runoff.
- (2) Any and all communications between EPA and any state agencies or departments, or staff thereof, or other third parties, relating to the CWA regulatory status of the above-described runoff.
- (3) Any and all administrative orders and notices of violation issued to, and other correspondence with, CAFO or AFO owners or operators, relating to the CWA regulatory status of the above-described runoff, as well as any inspection reports and findings related to such orders and notices.
- (4) Any and all communications between EPA and any state agencies or departments, or staff thereof, or other third parties, relating to any of the records described in (3) above.
- (5) Any and all internal communications within EPA, including communications within EPA Headquarters or between EPA Headquarters and EPA Regions, relating to any of the records described in (3) above..

Defined Terms

The term "EPA" as used herein refers to the United States Environmental Protection Agency and includes all headquarters and regional offices, and all officers, staff, agents, consultants, political appointees and employees thereof.

The term "records" as used herein includes the original and all non-identical copies or drafts, however produced or reproduced, of any written or graphic matter, as well as computer files, including but not limited to writings, handwritings, drawings, graphs, charts, maps, correspondence, faxes, electronic mail (i.e., e-mails), attachments to electronic mail, any other electronic communications, notes of telephone conversations or of meetings or conferences, minutes of meetings, interoffice communications, memoranda, reports, studies, analyses, results of investigations, photographs, sound recordings, trip files, electronically stored information, other data compilations from which information can be obtained, and any other documentary material, regardless of physical form or characteristics.

The term "relating to" as used herein means addressing, constituting, mentioning, discussing, describing, reflecting, identifying, dealing with, consisting of, explaining,

referring to, containing, enumerating, or in any way concerning or pertaining to, in whole or in part, directly or indirectly.

FOIA Response

The records requested herein relate to the regulatory status under the CWA of precipitation runoff or precipitation "discharge" associated with CAFOs and AFOs.

We believe that these records are not exempt from disclosure. If EPA should deny access to any records covered by this request, however, please describe in detail each of those records and specify the statutory basis claimed for denial as well as any reasons for asserting that claim. As you know, FOIA provides that if only a portion of a record is exempt from release, all reasonably segregable portions shall be provided. Thus, if EPA asserts that a portion of a record that we have requested is exempt, please provide us with a copy of the remainder of the record. If EPA asserts that the exempt portions cannot be reasonably redacted, please state in detail the reasons for that assertion.

Please provide the requested material at the earliest possible date, and, in any event, please provide as complete a response as possible to this request within the twenty (20) day period prescribed by FOIA. As described above, AFBF's request was initially submitted on May 3, 2013 and over 50 business days have passed. Please forward currently available records as soon as possible and others as they become available.

Fee Waiver Request

AFBF hereby asks EPA to waive all fees associated with this request. As required for a FOIA fee waiver, under 5 U.S.C. § 552(a)(4)(A)(iii), disclosure of the information requested is (1) in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of EPA, as an agency of the federal government, and (2) is not primarily in the commercial interest of AFBF or its members. Congress has directed that fee waivers be liberally construed in favor of noncommercial requesters. AFBF is a not-for-profit organization whose mission is to be the unified national voice of agriculture and who works with grassroots Farm Bureau organizations to strengthen and improve American agriculture and to build strong, prosperous rural communities.¹ AFBF is an independent, non-governmental, voluntary organization governed by and representing American farmers and ranchers united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and technological improvement and, thereby, to promote an efficient, productive, and strong agricultural community.

Through its public website, electronic newsletters, blogs and notices, issue papers, press releases, conferences, meetings, regulatory comments and legislative outreach

¹ For more information about AFBF, please see the organization's website at www.fb.org.

campaigns, AFBF regularly notifies and informs its members, lawmakers and the public of governmental activities and operations that affect farmers and ranchers. AFBF intends to disclose and use the information requested herein to help its members, farmers and ranchers, lawmakers, and the general public better understand government; in particular, how EPA implements its statutory and regulatory authority under the CWA with regard to the subject of this request. In furtherance of disclosure, AFBF also intends to disseminate and make available to the public any responsive documents that EPA provides to AFBF by posting them on its public website. As described further below, this request meets the six factors that EPA uses to review fee waiver requests, at 40 C.F.R. § 2.107(l).

Factor 1. The subject of the request. The subject of our request concerns the direct operation and activity of the EPA. Specifically, as described in detail above, this request seeks to disclose how EPA regulates, and enforces the regulation of, precipitation runoff or precipitation "discharge" associated with CAFOs and AFOs under the CWA.

Factor 2. The informative value of the information to be disclosed. EPA's disclosure of the records requested will contribute to a better public understanding of EPA's operations and activities. Any records disclosed would help shed light on how EPA implements its regulatory authority under the CWA. The information requested is substantive, not administrative in nature, and is not readily available from any other source but EPA. Currently, the information already available in the public domain leaves the question of how EPA regulates the precipitation runoff or precipitation "discharge" associated with certain CAFOs and AFOs unclear. For example, in previous documents not directly on point but addressing the issue in passing, EPA has referenced such runoff in various ways, including as "industrial wastewater" or "process wastewater" or as "stormwater." The records requested would be meaningfully informative and "likely to contribute" to an increased public understanding of how EPA implements its regulatory authority with regard to the subject matter of this request.

Factor 3. The contribution to an understanding of the subject by the public is likely to result from disclosure. As described above in Factor 2, the requested information will contribute to "public understanding" of a broad audience of persons interested in how EPA implements its authority under the CWA, including AFBF's members, other state and local Farm Bureau organizations, farmers and ranchers in general, and lawmakers throughout the country. Through its website, electronic newsletters, blogs and notices, issue papers, press releases, conferences, meetings, regulatory comments, and legislative outreach campaigns, AFBF intends to notify and inform its members, lawmakers and the general public of how EPA's activities and operations that are the subject of this request affect farmers and ranchers. AFBF also intends to disseminate and make available to the public any responsive documents that EPA provides to AFBF by posting them on its public website, at www.fb.org, within two months of receipt.

Factor 4. The significance of the contribution to public understanding.

Disclosure of the requested information is likely to contribute "significantly" to public understanding of EPA's operations or activities because, as explained above, the information already available on the subject of this request does not clearly establish how EPA implements its CWA authority. Disclosure of the information requested will inform AFBF and its members, farmers and ranchers, and lawmakers about the regulatory status of certain precipitation runoff associated with tens of thousands of farming operations and how EPA treats such runoff with regard to administrative enforcement and will, therefore, contribute significantly to farmers and ranchers' and the public's understanding of EPA's authority under the CWA. Currently, public awareness and understanding of this subject is low in part because EPA's position is unclear and the Agency has provided conflicting, ambiguous and incomplete public statements. Therefore, disclosure of the requested information will greatly enhance AFBF's, its members', farmers and ranchers,' in addition to the general public's, understanding of the subject.

Factor 5. The existence and magnitude of a commercial interest.

AFBF does not have a commercial, trade or profit interest that would be furthered by the requested information. AFBF is a not-for-profit organization with no commercial interest in the substantive information requested from the Agency, other than to provide that information to its members as a news organization would provide information to its customers. EPA ordinarily presumes the public interest will be the interest primarily served by disclosure to a news media requester. As described further below, AFBF's primary interest in requesting this information is to disclose it to its members, farmers and ranchers, lawmakers and the public that are interested in how EPA implements its authority under the CWA, and not to advance AFBF's commercial interest.

Factor 6. The primary interest is in disclosure. AFBF does not have a commercial interest in disclosure, and even if it did, it would only be secondary and indirect and would be outweighed by the primary public interest in disclosure of the information requested. AFBF regularly engages in informational, legislative and litigation campaigns designed to influence public policy consistent with AFBF's mission to enhance and strengthen the lives of rural Americans and America's agricultural communities. Such public policy campaigns do not amount to furthering a direct interest in commerce, trade or profit. Moreover, although AFBF is currently engaged in litigation with EPA, this FOIA request does not amount to "an attempt at discovery" as that litigation is (1) based on an administrative record that has already been completed; and (2) involves summary judgment briefing that is due prior to the anticipated response date for this FOIA request.

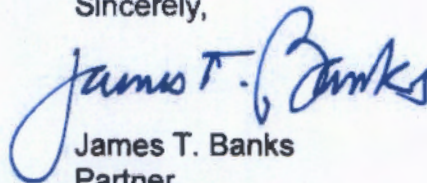
A fee waiver is justified because disclosure of the requested information is in the public interest and that primary public interest is greater in magnitude than that any potential commercial interest AFBF could have in disclosure. Alternatively, in accordance with FOIA and applicable regulations, we are prepared to pay the proper fees for the direct costs of record searches, review and duplication if this fee waiver request is properly

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denied. If your office estimates that costs will exceed \$1000, please call me before complying with this request to obtain my agreement to pay the fees.

Please contact me at (202) 637-5802 or via e-mail at james.banks@hoganlovells.com if you have any questions concerning this request. I look forward to your prompt response.

Sincerely,



James T. Banks
Partner
Counsel for AFBF

cc: Ellen Steen
Steve Butler